



POLICE DEPARTMENT

October 21, 2015

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Anthony Guido
Tax Registry No. 932757
Fleet Services Division
Disciplinary Case No. 2014-12706

The above-named member of the Department appeared before me on June 8, June 9, June 10, and June 22, 2015, charged with the following:

1. Said Police Officer Anthony Guido, assigned to 18th Precinct, on or about and between October 19, 2014 and October 22, 2014, engaged in conduct prejudicial to the good order, efficiency or discipline of the Department in that said Police Officer Guido wrongfully ingested clenbuterol, a performance enhancing drug not approved for human use, without police necessity or authority to do so. (*As amended*)

P.G. 203-10, Page 1, Paragraph 5 – GENERAL REGULATIONS

2. Said Police Officer Anthony Guido, assigned to 18th Precinct, on or about and between October 19, 2014 and October 22, 2014, engaged in conduct prejudicial to the good order, efficiency or discipline of the Department in that said Police Officer Guido wrongfully possessed clenbuterol, a performance enhancing drug not approved for human use, without police necessity or authority to do so. (*As amended*)

P.G. 203-10, Page 1, Paragraph 5 – GENERAL REGULATIONS

The Department was represented by Jamie Moran, Esq, Department Advocate's Office. Respondent was represented by Richard Collins, Esq. Respondent pleaded not guilty to the subject charges. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

Respondent is found Not Guilty.

SUMMARY OF EVIDENCE PRESENTED

It is not disputed that on October 22, 2014, Respondent reported as ordered to the Medical Division's Drug Screening Unit (DSU) for random drug testing. Police Officer Sandro Scacchi collected both hair samples (taken from hair on his back) and urine samples from him. Respondent completed two Drug Screening Questionnaires. One questionnaire related to hair samples and the other related to his urine samples. On the hair sampling questionnaire Respondent wrote that he had consumed [REDACTED] [REDACTED], within the previous three months. [REDACTED] On the urine sampling questionnaire, he listed [REDACTED] [REDACTED] he had consumed within the previous three days. Respondent's urine samples were analyzed by Quest Diagnostics Laboratory (Quest) which reported to DSU that his urine samples had tested positive for the presence of clenbuterol. His hair samples tested negative.

Respondent denied that he had ever knowingly possessed or ingested clenbuterol. Respondent testified that one of the supplements he was consuming must have contained clenbuterol, but that he was unaware of this.

It is not disputed that Clenbuterol is not listed as a controlled substance under the federal Controlled Substances Act or under the New York Public Health Law. Department witnesses Dr. Gary Green and Police Surgeon Joseph Ciuffo both testified that clenbuterol is neither an anabolic steroid nor a human growth hormone (HGH). Dr. Green explained that clenbuterol is a stimulant that is primarily used as an asthma medication in other countries. It has not been

legally available for human consumption in the United States since the 1980s because there are better medications for asthma and because clenbuterol has significant adverse side effects, such as tremors, palpitations, headaches, and can cause high blood pressure. Because clenbuterol favors "protein synthesis over fat," it continued to be used in the livestock industry until 1991, at which point it was banned in the United States due to health concerns. It was banned in the European Union five years later. It is still used for livestock breeding in some other countries, such as Mexico and China. Nonetheless, clenbuterol is used by some bodybuilders as a performance-enhancing drug and for its fat-burning qualities. Even though clenbuterol is banned in the United States, it is advertised on bodybuilding websites.

Dr. Barry Sample, director of science and technology at Quest, was deemed an expert in the field of forensic toxicology. [DX 9 is his curriculum vitae.] Sample explained that for the testing of anabolic agents and performance-enhancing drugs, Quest receives two urine samples from the Department. A portion of the first sample undergoes gas chromatography/mass spectrometry (GC/MS). If this initial test comes back positive, a second portion of the original sample undergoes GC/MS as a confirmatory test. If this test comes back positive, the laboratory proceeds to testing on the second sample. A positive result is reported to the Department only when the initial and confirmatory tests on both samples are positive.

DX 10 and 11 are the laboratory data packages on Respondent's two urine samples. They show that Respondent's samples came back positive for clenbuterol. Quest does not ordinarily perform quantitative analysis for a substance like clenbuterol but at the Department's request Sample was able to estimate the clenbuterol concentration in Respondent's urine. He estimated 14 nanograms per milliliter (ng/ml) in Respondent's first sample and 12 ng/ml in the second.

When asked on cross-examination who determines what substances Quest tests for pursuant to Department policy, Sample explained that the Department provided the lab with a list of substances but that this list was not meant to be all inclusive. Sample did not personally review the list and he was unable to cite to any document memorializing that the Department had requested that Quest test urine samples for the presence of clenbuterol.

Police Surgeon Joseph Ciuffo, a medical review officer, explored possible explanations for Respondent's positive drug test results. As part of his investigation, he interviewed Respondent twice and he reviewed Respondent's medical records and supplements. Respondent told Ciuffo that he was prescribed [REDACTED] and that he last took that medication within a couple days of the sample collection. Respondent also took several over-the-counter vitamins and supplements, including a [REDACTED] [REDACTED] to burn fat, [REDACTED], and [REDACTED]. Respondent told Ciuffo that he bought these supplements over the counter at the Westerley Market in Manhattan. Ciuffo examined their listed ingredients. Ciuffo spoke with Shiya Ribowski, a physician's assistant who treated Respondent at the Restoration Men's Health Center. Ribowski informed Ciuffo that Respondent went to the center with symptoms of fatigue and [REDACTED]. Bloodwork revealed a low testosterone level, which is why Respondent was prescribed [REDACTED]. Ciuffo ultimately concluded that there was no legitimate medical explanation for why Respondent's urine tested positive for clenbuterol.

Dr. Gary Green, a clinical professor at the UCLA School of Medicine, who is medical director for Major League Baseball (MLB) and also serves as a consultant to MLB on anabolic steroids and performance-enhancing drugs was deemed an expert in the field of drug testing and performance-enhancing drugs. [DX 4 is his curriculum vitae.] He explained that [REDACTED] is

generally used by women to improve fertility. It is rarely prescribed to men, though it could potentially be used to raise sperm count. In Green's experience, the main use of [REDACTED] in men is by bodybuilders who have low testosterone due to previous use of anabolic steroids. [REDACTED] can be used in these cases to restart testosterone production. [REDACTED] would not result in a positive test for the presence of clenbuterol. As to the supplement [REDACTED] Green testified that it is a fat burner containing caffeine and a proprietary blend of several other substances.

[REDACTED]
[REDACTED]
the label for the supplement Chain'd Out.]

Green helped write the Personnel Bureau Memo that lays out the Department's policy on anabolic steroids and human growth hormone. [DX 7 is a copy of the memo which is dated July 1, 2011.] Because dietary supplements are poorly regulated, the memo urges members of the service to only use nutritional supplements that are "NSF Certified for Sport." Green explained that the NSF or National Sanitation Foundation is a leading certification company that does an excellent job of testing for contamination before certifying a product. [REDACTED] and Chain'd Out all lack NSF certification. None of these supplements listed clenbuterol as an ingredient. Nothing that Green reviewed for this case, including Respondent's medical records, supplements, and foods he ingested prior to the sample collection, explained the positive result for clenbuterol.

Green confirmed that every year the World Anti-Doping Agency Code updates a ten-page list of substances that Olympic athletes are prohibited from taking. The term "and related substances" is used to make the athletes aware that the list is not exhaustive. MLB also uses a list many pages long of banned performance-enhancing substances. Although this list is non-exhaustive, it provides examples of different categories so that players have notice of the types of

substances they will be tested for. He agreed that since clenbuterol is not a controlled substance, he was not aware of any legal restrictions for its possession.

Green has many times seen situations where the label to a dietary supplement does not accurately reflect the contents of the bottle. In fact, there have been studies that have found up to a quarter of certain dietary supplements with banned ingredients. Supplements used for bodybuilding, fat burning, and weight loss are the ones most likely to be contaminated. It has happened that a person without knowingly ingesting clenbuterol has tested positive for the drug after taking a non-NSF-certified supplement. Green agreed that there is no reference to clenbuterol in Department policy as a substance that is banned or would be tested for. Green asserted that the Department's list of banned substance was not exhaustive. The supplements used by Respondent are available over-the-counter in nutrition stores and supermarkets. Green confirmed that there is no law requiring people to buy only those supplements that have received NSF certification.

Respondent called Paul Scott and Sergeant Ryan Pierce as witnesses and he testified on his own behalf.

Paul Scott is the president of Scott Analytics, an anti-doping services provider that has a certification program for dietary supplements. He previously served as chief science officer for the Agency for Cycling and Ethics. He has testified in 27 cases as an expert in the testing of performance-enhancing drugs. He has been involved in previous clenbuterol cases, including the case of Jessica Hardy, an Olympic swimmer who tested positive for clenbuterol after taking a supplement.

Scott testified that dietary supplements can be sold without prior approval of any governing body. The industry is so poorly regulated that there is a long history of dietary

supplements containing substances that are found on banned lists. While the Department's list of prohibited substances speaks to anabolic steroids and growth hormones, clenbuterol falls into neither of those categories. According to Scott, an agency's anti-doping policy should indicate the risks of taking supplements, that they may contain banned substances, and it should provide some educational material to help the subjects of the program understand those risks and be able to adequately assess whether when they take a supplement they are engaging in risky or safe behavior. Upon reviewing the labels for the supplements used by Respondent, Scott testified that he saw no ingredient that was banned.

Scott agreed that because of the risks of a supplement producing an adverse result on a drug test, he advises athletes to stay away from them. Although athletes subject to the purview of the World Anti-Doping Agency and International Olympic Committee are banned from using clenbuterol, Scott knows of no law that prohibits clenbuterol consumption in the United States. The NSF is the most comprehensive certification program for supplements. The supplements used by Respondent are certified by neither Scott's certification program nor the NSF. On redirect examination, he testified that certification does not guarantee that a supplement will not contain an unlisted substance or cause a positive drug test result.

Sergeant Ryan Pierce, who is assigned to the Internal Affairs Bureau, testified that he is not aware of any law that makes it illegal to possess clenbuterol in the State of New York.

Respondent asserted that he bought his supplements at the health food store located across the street from his command and that he used them because he wanted to get in better shape. Respondent purchased Met-Rx because it was advertised as a pre-workout supplement; Chain'd Out because it was advertised as an amino acid supplement; and [REDACTED] because it was advertised as a fat burner.

Before buying these supplements, Respondent read the ingredients on the labels, looked up the ingredients and cross-referenced them to the Personnel Bureau Memo that contains the list of substances banned by the Department. No ingredient on the supplements' labels appeared on the banned substance list. He did not understand at the time what NSF-certified meant. If he had it to do over again, he would have been more diligent in his selection of supplements. He no longer takes these supplements.

Until 2010 Respondent participated in bodybuilding shows put on by the International Natural Bodybuilding Federation (INBF). The INBF requires competitors to be drug free. Clenbuterol is among the substances banned by the INBF. Respondent twice passed INBF drug tests and also passed polygraph tests that were administered by the INBF about prior drug use.

Respondent confirmed that he ingested [REDACTED] on October 22, 2014, the day that his urine and hair samples were collected by Scacchi. He ingested [REDACTED] and [REDACTED] three days before. Protein powder and a multivitamin were the only supplements he ever bought on the internet.

Respondent testified that he read Personnel Bureau Memo 44 (issued on July 1, 2011) which delineates the Department's policy on Anabolic Steroids and Human Growth Hormone, and the Appendix A to this memo which contains a "List of Potentially Contaminated Nutritional Supplements." It is not disputed that clenbuterol is not mentioned in Personnel Bureau Memo 44 and that neither [REDACTED], nor [REDACTED] nor [REDACTED] are on the Appendix A "List of Potentially Contaminated Nutritional Supplements." He testified that he has never knowingly possessed or ingested clenbuterol. Respondent testified that he believes one of his supplements was contaminated with clenbuterol.

FINDINGS AND RECOMMENDATIONS

Specification No. 2

It is charged that Respondent “wrongfully possessed clenbuterol, a performance enhancing drug not approved for human use.”

Clenbuterol is not a “controlled substance” under either federal law¹ or New York law.² Thus, unlike heroin, cocaine, marijuana, and the anabolic steroids which are listed on Schedule II of the New York Public Health Law, it is not a crime to possess clenbuterol. IAB’s Sergeant Pierce testified that he is not aware of any law that makes it illegal to possess clenbuterol within the State of New York and Department witnesses Dr. Green and Police Surgeon Ciuffo both testified that clenbuterol is neither an anabolic steroid nor a human growth hormone.

The Assistant Department Advocate (the Advocate) argued that because clenbuterol is not approved by the FDA for consumption by humans in the United States and because physicians cannot issue prescriptions to their patients for clenbuterol, mere possession of clenbuterol by a uniformed member of the service (MOS) constitutes misconduct. However, I need not decide whether simply possessing clenbuterol constitutes actionable misconduct because I find that the evidence presented by the Advocate was insufficient to prove that Respondent was aware that he possessed clenbuterol.

The only evidence offered by the Advocate to prove that Respondent possessed clenbuterol was the testing results produced by Quest regarding their analysis of the urine samples Respondent submitted after he reported as ordered to DSU for random drug screening.

Previous disciplinary decisions have held that a MOS should not be found guilty of having wrongfully possessed a drug unless the Advocate presents sufficient evidence that the

¹ See DX 12: “Clenbuterol,” *U.S. Drug Enforcement Administration* (Nov. 2013).

² See Penal Law section 220.00(5).

possession was knowing. In Case No. 2010-2139 (Aug. 13, 2013), a sergeant was found not guilty of possessing anabolic steroids or HGH. In that case, the sergeant placed a telephone order for what he believed were legal supplements and the Advocate relied on the presumption that because the supplements that were sent to the sergeant contained steroids, he intended to possess and ingest steroids. The sergeant testified that he had no intention of purchasing steroids and because the labels on the supplements that were delivered to him appeared to be coming off he threw them out. The Trial Commissioner found that the Department failed to sufficiently prove that Respondent intended to possess any anabolic steroids or HGH. Here, I similarly credit Respondent's testimony that he did not intend to possess clenbuterol. See also Case No. 2011-4876 (Nov. 4, 2013) where an MOS was found not guilty of possession of cocaine that was discovered in a closed bedroom of the MOS's brother. See also Case No. 2009-85950 (May 23, 2012) and Case No. 2009-85194 (Aug. 24, 2011).

Here, the Department presented inadequate evidence that Respondent knew, or should have known, that the supplements he purchased included clenbuterol as an ingredient. The Department's expert, Dr. Green, confirmed that none of the supplements Respondent admitted to using listed clenbuterol as an ingredient on their labels. Moreover, I credit Respondent's testimony that he made a good faith effort to purchase supplements containing ingredients that did not violate Personnel Bureau Memo 44 or Appendix A to this memo.

Based on the above, I find that the evidence presented by the Advocate was insufficient to prove that Respondent was aware that he possessed clenbuterol.

Specification No. 1

It is charged that Respondent "wrongfully ingested clenbuterol, a performance enhancing drug not approved for human use." The Advocate argued that paragraph 16 of the Personnel Bureau Memo regarding "Anabolic Steroids and Human Growth Hormone" that was issued on July 1, 2011 (DX 7), and the Appendix A to that memo, placed Respondent on notice that he should not consume any dietary supplement that was not NSF approved and that if he did consume a non-NSF approved dietary supplement that contained a banned substance, he was subject to disciplinary action even if he was not aware that the supplement contained a banned substance. However, paragraph 16 of the Personnel Bureau Memo does not mandate that MOS consume only dietary supplements that are NSF approved. Rather, it only states that MOS are "strongly advised to seek NSF certified products when using dietary supplements." Similarly, Appendix A to the memo only states that "members are urged to only use nutritional supplements that are NSF Certified for Sport."

Despite this advisory language, the Advocate essentially argued that Respondent should be held to a strict liability standard regarding the chemical contents of any dietary supplement he consumed that was not NSF approved. The Advocate's position is not supported by prior disciplinary decisions. MOS have been found not guilty of charges that they wrongfully ingested a substance where the Department failed to sufficiently prove that the MOS intended to ingest the substance. For example, in Case No. 2010-251 (Dec. 17, 2012), a police officer was found not guilty of possessing or ingesting anabolic steroids and human growth hormones (HGH) for purposes outside the normal course of standard medical care because the Department Advocate presented insufficient evidence to establish that Respondent knew or should have known that the treatment he was receiving was inappropriate.

Finally, it must be noted that to insure that MOS whose samples have tested positive for illegal substances, such as cocaine and marijuana, have tested positive because they actively consumed these substances, an administrative cutoff reporting level has been established by the Department to eliminate the possibility that a positive report is the result of mere passive ingestion of these substances. However, here, the clenbuterol results that Quest reported to the Department regarding Respondent's urine samples were not subjected to an administrative cutoff reporting level because no cutoff reporting level has been established by the Department for clenbuterol.

Since I have found that the Advocate failed to sufficiently prove that Respondent knowingly ingested clenbuterol, I need not determine Respondent's motion that these charges should be dismissed because DSU's collection of a urine sample from Respondent violated Patrol Guide Procedure No. 205-29 "Random Drug Screening" (issued on Aug. 1, 2013). Respondent's attorney argued that paragraph number 4 of this procedure only requires a MOS who has been ordered to undergo random drug testing to provide hair samples and that the word "urine" does not appear anywhere in this Procedure.

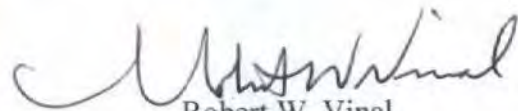
The Additional Data section of this Procedure states: "In the event that the member concerned is unable to provide adequate hair samples as required in this procedure, a Department surgeon will be contacted. The Department surgeon, upon conferral with the supervising chief surgeon or designee, may authorize the collection of alternate specimen(s) to complete the drug screening test." Here, however, since Officer Scacchi collected adequate hair samples from Respondent by cutting hair off of his back, there was no need for Scacchi to contact a Department surgeon to request permission to collect urine specimens from Respondent and Scacchi did not seek such permission. Scacchi, nonetheless, collected urine samples from

Respondent because Scacchi was told that Respondent was one of the MOS who would be subjected to "random double" testing. The Advocate did not cite to any Department document which authorizes "random double" testing and no Interim Order has been issued amending Patrol Guide Procedure No. 205-29 to permit collecting both hair and urine samples from an MOS during random drug screening.

Similarly, I also need not determine Respondent's other motion that these charges should be dismissed because the testing of Respondent's samples for the presence of clenbuterol violated Patrol Guide Procedure 205-29, which informs MOS (in the last paragraph of the Additional Data section) that, "Testing will be conducted only for illegal drugs and controlled substances. No other substances will be screened." The Advocate offered no evidence at this trial that the Department has provided any notice to MOS that their samples will be screened to ascertain whether they contain clenbuterol.


Respondent is found Not Guilty.

Respectfully submitted,



Robert W. Vinal
Assistant Deputy Commissioner - Trials

APPROVED

FEB 16 2016

WILLIAM J. BRATTON
POLICE COMMISSIONER